

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CASSIE ANN TAYLOR,

Plaintiff,

v.

BANK OF AMERICA, N.A,
NORTHWEST TRUSTEE
SERVICES, INC., and DOES 1-100,

Defendants.

NO: 13-CV-0369-TOR

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS

BEFORE THE COURT are the following motions: (1) Defendant Bank of America's Motion to Dismiss (ECF No. 7); (2) Defendant Northwest Trustee Services' Motion to Dismiss (ECF No. 15); (3) Plaintiff's Motion for Leave to File an Amended Complaint (ECF Nos. 16, 17 & 18); and (4) Plaintiff's Motion for Summary Judgment (ECF No. 22). These matters were submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

1 BACKGROUND

2 The Plaintiff in this diversity case, proceeding *pro se*, asserts claims for
3 breach of contract, unjust enrichment and conversion arising from her efforts to
4 halt a non-judicial foreclosure of her home. Defendants have filed motions to
5 dismiss for failure to state a claim. Plaintiff has filed a motion for summary
6 judgment. For the reasons discussed below, the Court will grant Defendants'
7 motions and dismiss Plaintiffs' claims with prejudice.

8 FACTS

9 The following facts are drawn principally from Plaintiff's Amended
10 Complaint and the materials attached thereto, and are accepted as true for purposes
11 of the instant motion. *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th
12 Cir. 2001). In August 2010, Plaintiff Cassie Ann Taylor¹ and Matthew Price

13 ¹ The named plaintiff in this case is Price Legacy Trust. Ms. Taylor claims to be
14 pursuing this action on behalf of Price Legacy Trust as its "trustee." As Ms.
15 Taylor is not a licensed attorney, she has no authority to represent the Trust in
16 these proceedings. *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th
17 Cir. 1987). Nevertheless, the record firmly establishes that Ms. Taylor, rather than
18 Price Legacy Trust, is the real party in interest. *See* Fed. R. Civ. P. 17 ("An action
19 must be prosecuted in the name of the real party in interest."). Pursuant to Rule 21,
20 the Court hereby **SUBSTITUTES** Cassie Ann Taylor for Plaintiff Price Legacy

1 borrowed \$168,610 from Cherry Creek Mortgage Co. to purchase a home in
2 Spokane. As security for the loan, Plaintiff and Mr. Price executed a deed of trust
3 in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee
4 for Cherry Creek Mortgage Co. The loan was subsequently acquired by Defendant
5 Bank of America.

6 At some point in 2012, Plaintiff and Mr. Price fell behind on their loan
7 payments. On June 5, 2012, MERS executed an assignment of deed of trust in
8 favor of Bank of America. On March 25, 2013, Bank of America initiated non-
9 judicial foreclosure proceedings by appointing Defendant Northwest Trustee
10 Services (“NWTS”) as successor trustee. On April 9, 2013, NWTS recorded a
11 notice of trustee’s sale advising Plaintiff and Mr. Price that their home would be
12 sold at auction on August 23, 2013.

13 On August 2, 2013, Plaintiff mailed a document to Bank of America bearing
14 the caption “Notice of Settlement Offer.” The terms of this offer called for Bank
15 of America to accept a “tender” in the amount of \$540,000 in full satisfaction of

16
17 Trust. *See Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1040-41 (N.D. Cal.
18 2006) (substituting real party in interest *sua sponte* under Rule 21 in order to avoid
19 “depriving the real party in interest . . . of its claims, while [also] protect[ing] the
20 Defendants against subsequent action by the party actually entitled to recover.”).

1 the mortgage. The offer also purported to become binding upon Bank of America
2 unless it was specifically rejected within 20 days of receipt. ECF No. 18-5 at 2.
3 Enclosed with this document was a “Draft Money Order Receipt” purporting to
4 transfer \$540,000 to Bank of America. This “Money Order” was drawn on the
5 “United States Treasury, 1500 Pennsylvania Avenue N.W., Washington, D.C.
6 20220.” ECF No. 18-5 at 8.

7 On August 20, 2013, three days before the scheduled trustee’s sale, Plaintiff
8 recorded a document styled as a “Notice of Termination of Trustee” in the Spokane
9 County Auditor’s Office. This document purported to unilaterally terminate the
10 authority of NWTS to move forward with the foreclosure proceedings. ECF No.
11 18-7. On the same date, Plaintiff filed a series of UCC financing statements
12 claiming a security interest in the property.²

13 NWTS moved forward with the trustee’s sale as scheduled on August 23,
14 2013. The property was purchased by Bank of America.
15
16
17

18 ² The filing statements list a “Date of Filing” as August 20, 2013. The recording
19 stamps at the top of each statement, however, are dated September 16, 2013. ECF
20 No. 18-6.

1 Plaintiff filed the instant lawsuit in Spokane County Superior Court on
2 September 17, 2013. Defendants subsequently removed the case to this Court on
3 diversity of citizenship grounds³ on October 21, 2013.

4 DISCUSSION

5 A motion to dismiss for failure to state a claim tests the legal sufficiency of
6 the plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To
7 withstand dismissal, a complaint must contain "enough facts to state a claim to
8 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
9 (2007). "Naked assertion[s]," "labels and conclusions," or "formulaic recitation[s]
10 of the elements of a cause of action will not do." *Id.* at 555, 557. "A claim has
11 facial plausibility when the plaintiff pleads factual content that allows the court to

12
13 ³ Bank of America's Notice of Removal suggests that Defendant NWTs, which is
14 a Washington corporation, should be deemed a "nominal defendant" for purposes
15 of establishing diversity of citizenship. The Court agrees that NWTs is a nominal
16 defendant whose presence in this action does not destroy diversity of citizenship.
17 See *Townsend v. Quality Loan Serv. Corp.*, 2012 WL 5330972 at *2 (W.D. Wash.
18 2012) (holding that a successor trustee under a deed of trust should be considered a
19 nominal defendant when the plaintiff "has not made substantive allegations against
20 the trustee").

1 draw the reasonable inference that the defendant is liable for the misconduct
2 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a plaintiff need not
3 establish a probability of success on the merits, he or she must demonstrate “more
4 than a sheer possibility that a defendant has acted unlawfully.” *Id.*

5 A complaint must also contain a “short and plain statement of the claim
6 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This
7 standard “does not require detailed factual allegations, but it demands more than an
8 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at
9 678 (quoting *Twombly*, 550 U.S. at 555). In assessing whether Rule 8(a)(2) has
10 been satisfied, a court must first identify the elements of the plaintiff’s claim(s) and
11 then determine whether those elements could be proven on the facts pled. The
12 court should generally draw all reasonable inferences in the plaintiff’s favor, *see*
13 *Sheppard v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012), but it
14 need not accept “naked assertions devoid of further factual enhancement.” *Iqbal*,
15 556 U.S. at 678 (internal quotations and citation omitted).

16 Federal Rule of Civil Procedure 9(b) governs the pleading of allegations
17 involving fraud or mistake. In contrast to the more lenient standard set forth in
18 Rule 8(a)(2), Rule (9)(b) requires that a party “state with particularity the
19 circumstances constituting fraud or mistake” in his or her complaint. To satisfy
20 this standard, the allegations of fraud must “be specific enough to give defendants

1 notice of the particular misconduct so that they can defend against the charge and
2 not just deny that they have done anything wrong.” *Vess v. CibaGeigy Corp. USA*,
3 317 F.3d 1097, 1106 (9th Cir. 2003) (quotation and citation omitted). Thus,
4 “[a]verments of fraud must be accompanied by the who, what, when, where, and
5 how of the misconduct charged.” *Id.* (quotation and citation omitted). A party
6 may, however, plead allegations of “[m]alice, intent, knowledge, and other
7 conditions of a person’s mind” more generally. Fed. R. Civ. P. 9(b).

8 In ruling upon a motion to dismiss, a court must accept all factual allegations
9 in the complaint as true and construe the pleadings in the light most favorable to
10 the party opposing the motion. *Sprewell v. Golden State Warriors*, 266 F.3d 979,
11 988 (9th Cir. 2001). The court may disregard allegations that are contradicted by
12 matters properly subject to judicial notice or by exhibit. *Id.* The court may also
13 disregard conclusory allegations and arguments which are not supported by
14 reasonable deductions and inferences. *Id.*

15 The Ninth Circuit has repeatedly instructed district courts to “grant leave to
16 amend even if no request to amend the pleading was made, unless ... the pleading
17 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203
18 F.3d 1122, 1130 (9th Cir. 2000). The standard for granting leave to amend is
19 generous—the court “should freely give leave when justice so requires.” Fed. R.
20 Civ. P. 15(a)(2). In determining whether leave to amend is appropriate, a court

1 must consider the following five factors: bad faith, undue delay, prejudice to the
2 opposing party, futility of amendment, and whether the plaintiff has previously
3 amended the complaint. *United States v. Corinthian Colleges*, 655 F.3d 984, 995
4 (9th Cir. 2011).

5 **A. Plaintiff's Motion for Leave to Amend Complaint**

6 Plaintiff has filed a series of documents which the Court construes as a
7 motion for leave to amend the complaint. ECF Nos. 16, 17 & 18. Defendant Bank
8 of America does not oppose the motion. ECF No. 21. Defendant NWTs has not
9 responded. Pursuant to Local Rule 7.1(d), the Court deems Defendant NWTs's
10 failure to respond to the motion as consent to the entry of an adverse order. The
11 motion is therefore granted. The Amended Complaint filed at ECF No. 18-1 is
12 accepted as filed. This document is the operative pleading for purposes of the
13 pending motions to dismiss.

14 **B. Defendants' Motions to Dismiss**

15 1. Breach of Contract Claim

16 To prevail on her breach of contract claim, Plaintiff must establish: (1) the
17 existence of a valid contract; (2) breach; and (3) damages. *Nw. Indep. Forest Mfrs.*
18 *v. Dep't of Labor & Indus.*, 78 Wash. App. 707, 712 (1995). The elements of a
19 valid contract are offer, acceptance and consideration. *Veith v. Xterra Wetsuits,*
20 *L.L.C.*, 144 Wash. App. 362, 366 (2008). "There is no valid contract until an offer

1 is accepted.” *Id.* (quotation and citation omitted). “Acceptance is an expression
2 (communicated by word, sign, or writing to the person making the offer) of the
3 intention to be bound by the offer’s terms.” *Id.* (citation omitted).

4 Bank of America argues that the Amended Complaint fails to adequately
5 plead acceptance of the so-called “Settlement Offer.” ECF No. 7 at 13-16. The
6 Court agrees. Plaintiff does not allege that Bank of America affirmatively
7 accepted the offer. Instead, Plaintiff alleges that Bank of America implicitly
8 accepted the offer by failing to affirmatively reject it. *See* Pl.’s Am. Compl., ECF
9 No. 18-1 at 5 (alleging that the Settlement Offer became binding because it “was
10 not refused, returned or dishonored”). This allegation fails to establish acceptance
11 as a matter of law. *See Saluteen-Maschersky v. Countrywide Funding Corp.*, 105
12 Wash. App. 846, 853 (2001) (“Failure to reject an offer is not equivalent to assent
13 of that contract since silence is acceptance only where there is a duty to speak.”)
14 (citation omitted); *Roethemeyer v. Milton*, 177 Wash. 650, 658 (1934) (“[E]ven
15 though the offer states that silence will be taken as consent, silence on the part of
16 the offeree cannot turn the offer into an agreement, as the offerer cannot prescribe
17 conditions so as to turn silence into acceptance.”). Accordingly, Plaintiff’s breach
18 of contract claim must be dismissed.

19 Having reviewed the materials attached to the Amended Complaint, the
20 Court further concludes that granting Plaintiff leave to amend would be futile. The

1 terms of the “Settlement Offer” call for Bank of America to “discharge[e] all
2 rights, titles, and interests” in the property in exchange for a “tender” of \$540,000.
3 ECF No. 18-5 at 1-2. The tender however, is a sham. Rather than tendering
4 something of legal value, Plaintiff sent Bank of America a “Draft Money Order
5 Receipt” drawn on the “United States Treasury, 1500 Pennsylvania Avenue N.W.,
6 Washington, D.C. 20220.” ECF No. 18-5 at 8. As this document is worthless on
7 its face, the settlement agreement fails for lack of consideration. This claim is
8 dismissed with prejudice.

9 2. Unjust Enrichment Claim

10 To prevail on her unjust enrichment claim, Plaintiff must prove: (1) that she
11 conferred a benefit upon Defendants; (2) that Defendants knew of the benefit; and
12 (3) that it would be unjust to allow Defendants to retain the benefit without paying
13 for it. *Young v. Young*, 164 Wash.2d 477, 484 (2008).

14 The Amended Complaint alleges that Bank of America was unjustly
15 enriched by Plaintiff’s “tender.” Pl.’s Am. Compl., ECF No. 18-1 at 7, ¶ 3. As
16 noted above, however, Plaintiff did not tender anything of legal value to Bank of
17 America. Because Plaintiff has failed to plausibly allege that she conferred a
18 benefit upon any Defendant, her unjust enrichment claim must be dismissed. As
19 leave to amend would be futile, this claim will be dismissed with prejudice.

1 3. Conversion

2 “Conversion is the unjustified, willful interference with *a chattel* which
3 deprives a person entitled to the property of possession.” *Lang v. Hougan*, 136
4 Wash. App. 708, 718 (2007) (emphasis added). Money is considered a chattel for
5 purposes of a conversion claim “only if the defendant wrongfully received the
6 money or was under obligation to return the specific money to the party claiming
7 it.” *Davenport v. Wash. Educ. Ass’n*, 147 Wash. App. 704, 722 (2008) (internal
8 quotations and citations omitted).

9 In support of her conversion claim, Plaintiff alleges that Defendants
10 “accepted the . . . TENDER and converted the same for its [sic] own use.” Pl.’s
11 Am. Compl., ECF No. 18-1 at 8, ¶ 3. Once again, the “tender” is worthless on its
12 face. As Defendants are not alleged to have wrongfully interfered with Plaintiff’s
13 right to possession of something of legal value, this claim must be dismissed with
14 prejudice.

15 **C. Plaintiffs’ Motion for Summary Judgment**

16 In view of the foregoing rulings granting Defendants’ motions to dismiss,
17 Plaintiffs’ motion for summary judgment is denied as moot.

18 //

19 //

20 //

IT IS HEREBY ORDERED:

1. Pursuant to Federal Rule of Civil Procedure 21, Cassie Ann Taylor is hereby **SUBSTITUTED** for Plaintiff Price Legacy Trust as the real party in interest.
2. Plaintiff's Motion for Leave to File an Amended Complaint (ECF Nos. 16, 17 & 18) is **GRANTED**. The Amended Complaint at ECF No. 18-1 is accepted as filed.
3. Defendants Motions to Dismiss (ECF Nos. 7 and 15) are **GRANTED**. All claims and causes of action in this matter are hereby **DISMISSED** with prejudice for failure to state a claim.
4. Plaintiff's Motion for Summary Judgment (ECF No. 22) is **DENIED** as moot.

The District Court Executive is hereby directed to enter this Order, provide copies to counsel and Plaintiffs at their address of record, enter **JUDGMENT** for Defendants, and **CLOSE** the file.

DATED April 14, 2014.



Thomas O. Rice
THOMAS O. RICE
United States District Judge